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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re RICARDO A., a Person Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

VERONICA E.,

Defendant and Appellant.

D044676

(Super. Ct. No. NJ012408)

APPEAL from a judgment of the Superior Court of San Diego County, Joe O.
Littlejohn, Judge. Affirmed.

Veronica E., the mother of Ricardo A., appeals the termination of her parental
rights under Welfare and Institutions Code section 366.26.¹ Veronica contends the

¹ All statutory references are to the Welfare and Institutions Code.

juvenile court erred by failing to apply the beneficial relationship exception to adoption (§ 366.26, subd. (c)(1)(A)). Veronica also contends the court erred when it denied her section 388 petition, which sought placement of Ricardo with her and family maintenance services.

PROCEDURAL AND FACTUAL BACKGROUND

Ricardo was born in June 2002, with a positive toxicology for opiates and was taken into protective custody. Veronica admitted injecting heroin until the fourth month of the pregnancy and smoking heroin one week before Ricardo's birth. One of Veronica's two older children also was born with a positive drug toxicology. Veronica had started using heroin when she was 18 years old and had used it daily for nine years except during the pregnancy of her oldest child. Ralph A., the father of all three children, also had a long history of heroin use.²

On June 12, 2002, the San Diego County Health and Human Services Agency (Agency) filed a dependency petition on behalf of Ricardo under section 300, subdivision (b), alleging he was at substantial risk of harm because of Veronica's substance abuse. Agency did not file petitions on behalf of Veronica's other children, seven-year-old R.A. and five-year-old B.A., because Veronica entered into a voluntary services contract.³

² Ralph is not a party to this appeal.

³ Agency detained R.A. and B.A. in the paternal grandparents' home. R.A. and B.A. were returned to Veronica's custody after three months. Veronica, R.A. and B.A. continued to live in the maternal grandparents' home throughout this dependency proceeding. R.A. and B.A. are not subjects of this appeal.

On July 16, 2002, Veronica submitted to the allegations of Ricardo's petition, and the court sustained the petition. The court ordered Veronica to enroll in the Substance Abuse Recovery Management System (SARMS) and comply with her case plan, which required her to participate in individual therapy, undergo a psychological evaluation and complete a parenting course.

Ricardo was placed in the home of the paternal grandparents.

During the first six months of Ricardo's dependency, Veronica actively worked on her case plan. She complied with SARMS, attended the outpatient drug treatment program at Options for Recovery, and participated in weekly individual therapy. Veronica's service providers reported she was doing well. Veronica visited Ricardo weekly, and was showing appropriate care for her son. Veronica underwent a psychological evaluation, which concluded her major problem was severe addiction. The evaluator opined that as long as Veronica remained sober and participated in her classes, she would continue to progress and eventually reunify with Ricardo.

At the six-month review hearing on January 7, 2003, the court found Veronica had made substantive progress and ordered six more months of services. It granted the social worker discretion to expand Veronica's visitation to include overnight visits and a 60-day trial visit.

Veronica continued to comply with SARMS and attend the outpatient drug treatment program. Veronica completed the parenting education course, and her therapist said she no longer needed to continue in therapy.

On May 1, 2003, Ricardo started a 60-day trial visit with Veronica. Initially, the trial visit went well. Both sets of grandparents assisted Veronica with childcare as she participated in reunification services, maintained a part-time job and worked on obtaining her high school diploma.

On June 10, 2003, at the 12-month review hearing, the court found Veronica had made substantive progress and there was a substantial probability that Ricardo would be returned by the 18-month review date. The court continued the 60-day trial visit, stating that if the visit was not terminated in 20 days, it would become a placement. The court ordered six more months of services.

In mid-July 2003, Veronica told the social worker that she had used methamphetamine several times during the July 4th weekend.⁴ Veronica volunteered this information; her drug testing had not detected the methamphetamine use. Agency did not remove Ricardo because Veronica had been forthright and candid about the relapse after more than one year of sobriety, and Ricardo was staying at the paternal grandparents' home that weekend.

However, on September 8, 2003, Veronica tested positive for methamphetamine. Later that month, Veronica initially denied drug use when the social worker asked her about the positive test, but in a subsequent meeting with the social worker and the service providers, Veronica admitted she had used methamphetamine on September 6. The

⁴ Also during July, Veronica did not regularly attend her drug treatment program and had six SARMS violations.

social worker also learned that Ricardo was spending half of each week at the maternal grandparents' home and the other half at the paternal grandparents' home. Further, while Ricardo was at the maternal grandparents' home, it was the grandmother -- not Veronica -- who provided the bulk of care for Ricardo.

On September 23, 2003, Agency took Ricardo into protective custody and filed a section 387 petition, alleging Veronica was no longer able to provide adequate care and supervision for Ricardo because she had relapsed. The next day, Veronica enrolled in Juvenile Dependency Drug Court.

On October 14, 2003, the court sustained the section 387 petition and placed Ricardo in the paternal grandparents' home.

At the contested 18-month review hearing on December 10, 2003, the court found Agency had offered reasonable services, and return of Ricardo to Veronica's custody would be detrimental to him. The court terminated reunification services and set a section 366.26 permanency planning hearing.

On April 26, 2004, Veronica filed a section 388 petition in which she sought placement of Ricardo in her care and family maintenance services. As changed circumstances, the petition alleged Veronica had completed the Options for Recovery outpatient drug treatment program in February and was enrolled in the aftercare program, had completed another parenting class, was undergoing individual therapy, and was complying with drug court. The petition also alleged that returning Ricardo to Veronica's care would be in his best interests because it would allow him to continue his relationships with her and his siblings. The court found the section 388 petition met the

prima facie test for an evidentiary hearing, which would be held at the contested section 366.26 hearing.

On June 9, 2004, Veronica had 265 days of sobriety in drug court and was scheduled to graduate from drug court the following month.

The contested hearings began on June 15, 2004.

Agency reported that Veronica had a sponsor for the 12-step program, but had not been able to get together with the sponsor since the previous December because of conflicts in their schedules. Veronica testified that she had completed the first of the 12 steps without the help of a sponsor. In May 2004, Veronica obtained a new sponsor.

Veronica planned to marry her boyfriend, whom she met the previous October at a Narcotics Anonymous meeting. The boyfriend, who was 40 years old, had started using heroin when he was 11 years old and had been sober for one year.

Psychologist Rob Irwin, Veronica's therapist, reported that she appeared to be dedicated to her drug treatment program. Irwin, who began treating Veronica in March 2004, opined Ricardo was at low risk of harm if returned to Veronica. However, Irwin had not reviewed the entire case history and did not contact Veronica's service providers. Irwin testified that he would be concerned if it were true that Veronica had no contact with her sponsor and did not work on her 12-step program from December 2003 until

May 2004. Irwin denied telling the social worker that these aspects of the case raised red flags.⁵

Emma Anderson, Veronica's drug counselor at the Options for Recovery program since July 2002, opined Veronica was doing well in her recovery. Veronica had been in the aftercare program since February 2004. Veronica submitted to drug tests every Monday; the program did not randomly test Veronica.

Social worker Debbie Allen testified it would not be in Ricardo's best interests to be returned to Veronica. Ricardo had lived with his paternal grandparents for most of his life and had formed a very strong attachment to them. Allen opined removing Ricardo from the paternal grandparents' home would be detrimental to him.

Allen acknowledged that Veronica had made some progress in dealing with her substance abuse but had reservations because Veronica had not progressed beyond the first of the 12 steps, was not being randomly tested, wanted to marry someone who had a significant history of heroin abuse, and had not established a significant period of stability with respect to her sobriety.

On June 17, 2004, the court found that Veronica had failed to establish changed circumstances and to show it was in Ricardo's best interests to be returned to Veronica's custody. The court denied her section 388 petition.

⁵ The social worker subsequently testified that after she had informed Irwin that Veronica had gone several months without contact with her sponsor, Irwin responded: "That raises red flags."

With respect to the section 366.26 hearing, Agency reported the paternal grandparents wanted to adopt Ricardo and there were no obstacles to the approval of their adoptive home study. In addition, there were 56 approved adoptive families willing to adopt a child with Ricardo's characteristics.

Social worker Allen, who observed three visits between Veronica and Ricardo, opined there was no parent-child relationship even though the two played together and were affectionate. Veronica did not bring anything for Ricardo to these visits, such as diapers or snacks. At one visit, Ricardo attempted to leave when he heard the paternal grandparents outside the visitation area.

On July 7, 2004, the court found Ricardo was likely to be adopted if parental rights were terminated and that none of the statutory exceptions to adoption applied. The court terminated parental rights and selected adoption as the permanent plan for Ricardo.

DISCUSSION

I. Section 388 Petition

Veronica contends the juvenile court abused its discretion by denying her section 388 petition, which sought placement of Ricardo and family maintenance services. The contention is without merit.

Under section 388, a parent may petition the court to change, modify, or set aside a previous court order on the grounds of changed circumstances or new evidence. (§ 388, subd. (a).) The petition shall set forth why the requested modification is in the best interest of the dependent child. (§ 388, subd. (b).)

The parent bears the burden of showing *both* a change of circumstances exists and that the proposed change is in the child's best interests. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) The juvenile court may consider the entire factual and procedural history of the case in considering a section 388 petition. (*In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1450-1451.)

Rulings on section 388 motions are reviewed for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) The court's order on a section 388 motion will not be disturbed on appeal unless the court has exceeded the limits of legal discretion by making an arbitrary, capricious, or absurd determination. (*In re Stephanie M., supra*, 7 Cal.4th at p. 318.)

The record shows that at the time of the section 388 hearing, Veronica had remained sober for nine months after her relapses during the summer of 2003. She was in compliance with drug court and was scheduled to graduate from drug court the following month. Veronica also had completed her outpatient drug treatment program and was in the final aftercare phase of Options for Recovery. Her drug counselor believed Veronica was doing well. Veronica's therapist reported she was actively engaged in individual therapy, had taken responsibility for her actions and no longer blamed others. The therapist opined that any risk of harm to Ricardo was low if Veronica maintained her sobriety.

However, even with her commendable efforts and progress, Veronica not meet either prong of section 388.

To establish changed circumstances, Veronica needed to prove the circumstances that led to the termination of her services and the out-of-home placement of Ricardo were no longer present. In other words, Veronica had to show that substance abuse was no longer a problem. Given that Veronica had abused drugs since she was 18 years old, her nine months of sobriety after two relapses did not constitute changed circumstances within the meaning of section 388. At most, Veronica's latest period of sobriety and progress in treatment indicated *changing* circumstances regarding her ability to overcome her substance abuse problem. Veronica did not show she had been rehabilitated; nor did she show future relapses were unlikely. Notwithstanding her recent sobriety, Veronica had not made significant progress with the 12 steps and was dilatory in finding a sponsor without scheduling conflicts. Further, Veronica's engagement to a man who had had a 28-year heroin habit was a legitimate matter of concern. Veronica's ability to lead a drug free life continued to be questionable. This was not a case of changed circumstances.

Further to prevail, Veronica had to show that granting her petition would be in Ricardo's best interests. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 48.) When a parent's circumstances are "changing, rather than changed," it is not an abuse of discretion to deny a section 388 petition if the court concludes that granting the petition would not be in the children's best interests. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 49.) It does not promote stability for the child to delay the selection of a permanent home on the chance that a parent, who had failed at reunification in the past, "might be able to reunify [with this child] at some future point." (*Id.* at p. 47.) At this stage of the proceedings, the foremost concern is the child's interests in permanency and stability.

(*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) "Childhood does not wait for the parent to become adequate." (*Id.* at p. 310.)

Veronica was not ready to resume parental responsibility for her two-year-old child. Ricardo, who was removed from parental custody at birth, had been raised by his paternal grandparents for virtually his entire life. Even during the four and one-half months in 2003 that Ricardo lived in Veronica's home, the paternal grandparents took care of him on weekdays, and it was largely the maternal grandmother -- not Veronica -- who took care of him on the weekends. For a child who is under the age of three, the statutory preference is for a six-month reunification period. (§§ 361.5, subd. (a)(2), 366.21, subd. (e).) That period had long since elapsed, with Ricardo's dependency stretching over two years. Veronica had not established it would be in Ricardo's best interests to further delay his chance for permanency and stability.

Moreover, Ricardo had a strong attachment to his paternal grandparents; the social worker believed removing him from these caregivers would be detrimental to him.

The court did not abuse its discretion by denying Veronica's section 388 petition.

II. Beneficial Relationship Exception to Adoption

Veronica contends the juvenile court erred by choosing adoption as Ricardo's permanent plan because adoption would interfere with the beneficial parent-child relationship between them. The contention is without merit.

Our standard of review is the substantial evidence test. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) We determine if there is substantial evidence, contradicted or uncontradicted, to support the conclusions of the juvenile court, resolving all conflicts in

favor of the prevailing party, and drawing all legitimate inferences to uphold the lower court's ruling. (*In re Brison C.* (2000) 81 Cal.App.4th 1373, 1378-1379.)

Adoption is the permanent plan preferred by the Legislature. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826.) At the selection and implementation hearing, the court must terminate parental rights if the child is likely to be adopted within a reasonable time unless a statutory exception applies. (§ 366.26, subd. (c)(1).) The parent bears the burden to establish by a preponderance of the evidence that an exception to the statutory preference for adoption applies. (*Ibid*; *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1345.)

The beneficial parent-child relationship exception is one of the statutorily recognized exceptions to adoption. (§ 366.26, subd. (c)(1)(A).) This exception provides that after the court finds a child is likely to be adopted the court shall not terminate parental rights if it finds termination would be detrimental to the child because "[t]he parents . . . have maintained regular visitation and contact with the child *and* the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(A), italics added.) The exception applies only if both prongs are met.

There is substantial evidence that Veronica regularly visited Ricardo; the first prong of section 366.26, subdivision (c)(1)(A) was met. However, there was substantial evidence that Veronica and Ricardo did not have a beneficial parent-child relationship within the meaning of section 366.26, subdivision (c)(1)(A).

In *In re Autumn H.*, *supra*, 27 Cal.App.4th at page 575, this court explained that to come within the beneficial relationship exception to adoption, a parent must show the

"relationship promotes the well-being of the child to such a degree as to *outweigh* the well-being the child would gain in a permanent home with new, adoptive parents."

(Italics added.) The court must balance "the strength and quality of the . . . parent[-]child relationship in a tenuous placement against the security and the sense of belonging a new family would confer." (*Ibid.*) In balancing these interests, relevant factors include "[t]he age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs" (*Id.* at p. 576.) Further, the parent must show the benefit arises from a parental rather than a caretaker or friendly visitor relationship. (See *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1420; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.)

Ricardo was taken into protective custody at birth and shortly thereafter began living with his paternal grandparents, who provided him with the basic necessities of life as well as giving him the love and nurturing any young child needs. Even during the 60-day trial visit and the ensuing months when Ricardo lived in Veronica's home, the paternal grandparents took care of him at least half of the time. Throughout Ricardo's brief life, he has looked to his grandparents to meet his daily needs, not Veronica.

Although Veronica continued to have a relationship with Ricardo, it was not a parent-child relationship within the meaning of section 366.26, subdivision (c)(1)(A). During visits, Veronica did not bring basic items, such as diapers or snacks, for Ricardo; the paternal grandparents provided these. Veronica assumed the role of a pleasant -- even loving -- visitor. That is not enough.

The juvenile court could reasonably infer from the evidence that Veronica did not "occup[y] a parental role in [Ricardo's] life, resulting in a significant, positive, emotional attachment from child to parent." (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 953-954.)

Moreover, Ricardo was removed from Veronica twice because of her substance abuse. In balancing "the strength and quality of the natural parent[-]child relationship in a tenuous placement [with Veronica] against the security and sense of belonging a new [adoptive] family would confer," the court could reasonably conclude termination of Ricardo's relationship with Veronica would not be detrimental to him. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at pp. 575-576.)

Substantial evidence supported the court's finding that the section 366.26, subdivision (c)(1)(A) exception did not apply.

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

NARES, Acting P. J.

AARON, J.